93-509

No. _____

Supreme Court, U.S.
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— In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICK MARINO,

Petitioner,

v.

WRITERS' GUILD OF AMERICA, WEST, INC., FRANCIS F. COPPOLA AND MARIO PUZO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an arbitration procedure violate the principle of fundamental fairness, or the Federal Arbitration Act, 9 U.S.C. § 10, where neither the identities of the arbitrators, nor the arbitrators' possible partiality or bias, nor the arbitrators' dealings with the parties, are disclosed to the parties to the arbitration?

2. Does an arbitration procedure violate the principle of fundamental fairness, or the Federal Arbitration Act, 9 U.S.C. § 10, where there is no hearing, no right to see or respond to adverse evidence, no right to offer relevant evidence, no right to see the instructions given to the arbitrators, and the arbitrators are not required to consider all of the evidence?

3. Does a labor union's duty of fair representation to its members obligate the union, in conducting arbitrations to which its members are required to submit disputes, to conduct fundamentally fair arbitrations, to refrain from discriminating against one of its members, and to follow its own rules?

4. Did the Ninth Circuit erroneously affirm summary judgment upholding an arbitration award on the ground that a party waived his objections to the arbitration procedure, where there is substantial evidence that it would have been futile for that party to object to the arbitration procedures in issue, and there is no evidence that the party failed to object to such procedures?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Nick Marino, and the respondents, Writers' Guild of America, West, Inc., Francis F. Coppola and Mario Puzo. The Writers' Guild of America, East, Inc. was named as a defendant in the district court, but was not served with process. Consequently, the Writers' Guild of America, East, Inc. is not a party to the judgment below, and is not named as a party herein.

The respondents before this Court are the Writers' Guild of America, West, Inc., Francis F. Coppola and Mario Puzo.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Nick Marino, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on May 12, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 992 F.2d 1480, and is reprinted in Appendix A, *infra*. The Statement of Uncontroverted Facts and Conclusions of Law of the United States District Court for the Central District of California (REA, D.J.) has not been reported. It is reprinted in Appendix B, *infra*.

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 1337 and 29 U.S.C. § 185(a). On October 28, 1991, the district court granted the respondents' motion for summary judgment. *See* Appendix B, *infra*. On petitioner's appeal, the Ninth Circuit, on May 12, 1993, entered a judgment and an opinion affirming the judgment of the Central District. *See* Appendix A, *infra*. On May 27, 1993, petitioner timely filed a petition for rehearing. On June 30, 1993, the Ninth Circuit denied the petition for rehearing.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The following federal statute is relevant to the issues in this case: The Federal Arbitration Act, 9 U.S.C. § 10. Award of arbitrators; vacation; grounds; rehearing.

In either of the following cases, the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other behavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

I. *Introduction*

This action is to vacate an arbitration award of the screen credit for authorship of the motion picture "The Godfather Part III" ("Godfather III"). It challenges the unfair arbitration procedures involved, and the discriminatory conduct of the union which conducted the arbitration.

Petitioner Nick Marino ("Marino") is a motion picture writer, and is a member of respondent Writers' Guild of America, West, Inc. (the "WGA"). The WGA is a labor union representing writers in the motion picture and television industries, and is a signatory to a collective bargaining agreement (the "Minimum Basic Agreement" or "MBA") with various motion picture studios and production companies. Respondent Francis F. Coppola ("Coppola") is a motion picture writer, director and producer. Respondent Mario Puzo ("Puzo") is a motion picture writer and a novelist.

Pursuant to the MBA, the WGA conducts arbitrations for the award of screen credits for authorship of motion pictures. These awards are binding on the motion picture production companies who are signatories to the MBA. All WGA members are required to submit disputes concerning screen credits to these WGA arbitrations.

In 1985, Marino, together with a co-writer, wrote a treatment[1] for "Godfather III," which was purchased by Paramount Pictures Corporation ("Paramount"), a signatory to the MBA. Paramount then hired Marino to write a screenplay[2] based on the treatment. Marino wrote the screenplay, but Paramount chose not to produce it at that time. In 1987, Marino wrote a second treatment for "Godfather III," and sent it to executives at a production company owned by Coppola. In 1989 and 1990, Coppola and Puzo co-wrote a screenplay for "Godfather III." The motion picture was produced and completed in 1990. Paramount subsequently distributed "Godfather III" in various media throughout the world.

In 1990, the WGA conducted an arbitration to determine the screen credit for "Godfather III." Pursuant to that arbitration, the WGA awarded Coppola and Puzo the sole writing credit for the motion picture, and denied any credit to Marino.

II. *The WGA Arbitration Procedure*

The WGA's Screen Credits Manual contains the WGA's procedure for the arbitration of writers' screen

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[1] A motion picture treatment is an adaptation of literary or dramatic material for motion picture purposes in a form suitable for use as the basis of a screenplay.

[2] A motion picture screenplay is a final script with individual scenes, full dialogue and camera setups.

credits for theatrical motion pictures.[3] The WGA procedure provides no hearing, does not permit disclosure of the arbitrators' identities to the parties, causes the arbitrators to receive evidence *ex parte*, gives the arbitrators secret instructions, and precludes the parties from offering relevant evidence.

The WGA selects an arbitration committee, consisting of three WGA members, to make the credit determination. However, the WGA does not disclose to the parties the identities of the arbitrators or the arbitrators' dealings with the parties. Accordingly, the parties have no way to determine whether the arbitrators are properly qualified or whether they are partial or biased.[4]

The WGA provides each arbitrator with the following materials ("arbitration materials"): the writing credits as tentatively determined by the motion picture production company, arbitration statements submitted by the parties (and, possibly, by the motion picture production

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[3] If successive writers are employed on a single project, the credits are determined on the basis of the percentage of each writer's contribution to the final screenplay: A writer who contributes more than 33% of a screenplay based on source material such as the novel, "The Godfather," shall receive screenplay credit.

[4] The WGA does give writers an opportunity to review a list of potential arbitrators, and to peremptorily challenge a "reasonable number" of those potential arbitrators. However, the list contains over 1,600 names. According to the WGA's rules, a party has only 24 hours to make his or her challenges. Therefore, it is virtually impossible to review and research the qualifications, and the possible bias or partiality, of over 1,600 writers in connection with a WGA arbitration. As the Ninth Circuit wrote, "it may be well nigh impossible to ferret out possible bias in all of the persons on [the list]." *See* Appendix A, *page A10*.

company), a statement of the issues to be determined by the arbitrators formulated by the WGA's Arbitration Secretary ("instructions"), the literary material pertaining to the motion picture including the treatments and screenplays, and any other information deemed relevant to the controversy.

The WGA withholds much of the materials sent to the arbitrators from the participating writers. A writer cannot see any statements submitted by adverse parties or by the motion picture production company, the instructions formulated by the WGA's Arbitration Secretary, or other written material submitted to the arbitrators. Therefore, a writer cannot respond to, or correct, any erroneous or fraudulent statements made by the other parties, the motion picture production company, or the WGA.

Moreover, there is no hearing. Consequently, a writer has no way of knowing the basis on which the arbitrators make their decisions, or what evidence or standards they consider or use in order to do so.

Thus, the arbitration is conducted without any of the safeguards ordinarily associated with a fair adjudication: a hearing on the merits, disclosure of the evidence, confrontation of adverse parties, and impartiality of the individuals who determine the outcome of the dispute.

Furthermore, the WGA does not provide any meaningful review of the arbitrators' decision. Within twenty-four hours after the WGA notifies the parties of the decision, a party may request a review by a Policy Review Board consisting of members of the WGA Credits

Committee. However, the Policy Review Board's jurisdiction is strictly limited; it may consider only dereliction of duty by the arbitrators, undue influence upon the arbitrators, misinterpretation or misapplication of WGA policy, or important new evidence. Since the writer must make his or her appeal without any knowledge of anything that happened during the arbitration process, he or she has no way to determine the factual basis for any of the grounds upon which an appeal may be based. Moreover, the Policy Review Board cannot read the material involved, and cannot reverse the arbitrators' decisions in matters of judgment. Thus, the protesting writer has no effective or meaningful right of appeal.

The Screen Credits Manual provides that "at the request of any participating writer, the identity of all participating writers . . . shall not be told to the arbitration committee." Consequently, because Coppola and Puzo are well-known writers, and Marino and Wright are not, Marino and Wright requested that the WGA not reveal the identities of the participating writers to the arbitration committee. However, the Arbitration Secretary refused to maintain the anonymity of the participating writers, saying that Coppola had already submitted a statement identifying him as one of the writers of the final shooting script.

When the Arbitration Secretary sent the arbitration materials to the arbitrators, she omitted Marino's 1987 treatment. Marino requested, repeatedly, that the WGA include his 1987 treatment in the arbitration materials. However, the WGA refused to do so, stating that only

written materials which are subject to the MBA may be considered in a credit arbitration.[5]

The arbitration commenced on October 24, 1990. On November 5, 1990, the WGA informed Marino that the arbitrators had decided that Coppola and Puzo would receive sole writing credit for "Godfather III", and that Marino and Wright would receive no credit. Discovery in the action below revealed that two arbitrators voted in favor of the final result, and one arbitrator voted that Marino and Wright should receive a writing credit consisting of "Story by Nick Marino and Tom Wright." Although the WGA rules require that each arbitrator confirm his or her decision in writing, one of the two arbitrators who voted against Marino failed to do so.

Marino immediately requested a review by the WGA's Policy Review Board. Marino and Wright protested that the arbitration was unfair because, *inter alia*, the WGA would not divulge the identities of the arbitrators to them, and the WGA discriminated against them in conducting the arbitration. Because the WGA did not disclose any information concerning the arbitrators, the procedures they used, the evidence they reviewed, or how they interpreted or applied the WGA's policy, Marino and Wright had no

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[5] The MBA merely provides that any writer who has been employed by a producer on a story, or who has sold literary material subject to the MBA, shall be considered a participant in a credit arbitration. Here, since Marino was employed by Paramount, and sold his 1985 treatment to Paramount, he was considered a participant in the credit arbitration. Nothing in the MBA, or the Guild's rules, precludes a participant from offering evidence relevant to the credit determination in issue.

meaningful opportunity to present an appeal to the Policy Review Board.

Subsequently, members of the Policy Review Board telephoned the arbitrators to discuss the arbitration. The two arbitrators who voted against Marino conceded that they had not read all of the arbitration materials. Nevertheless, the WGA refused to order a new arbitration.

The law provides that Marino has a right to a fundamentally fair hearing and a right to be fairly represented by the WGA. However, the arbitration here was fundamentally unfair. Moreover, the WGA violated its duty of fair representation by discriminating against Marino, and by failing to follow its own rules providing for the anonymity of the writers involved in the arbitration and the submission of Marino's 1987 treatment.

For these reasons, summary judgment should be reversed, the case remanded for a trial on the merits, and the arbitration award vacated.

III. *The Action Below*

Marino filed this action in state court. The action was removed to the district court on the grounds that the proceedings were governed by a collective bargaining agreement and preempted by federal labor law. Marino and respondents (collectively) each filed motions for summary judgment. The district court granted respondents' motion for summary judgment, and denied Marino's motion. On October 25, 1991, the district court filed the Judgment herein.

Marino then filed an appeal to the Ninth Circuit, invoking jurisdiction under 28 U.S.C. § 1291. The Ninth Circuit affirmed the judgment of the district court.

The Ninth Circuit recognized that arbitrations must be procedurally fair: "It is undoubtedly true that all notions of procedural fairness cannot be jettisoned simply because the parties have agreed to arbitrate." (Appendix A, page A7)

However, the Ninth Circuit did not base its decision on substantive issues of procedural fairness. Rather, the court held that Marino waived his claims relating to the anonymity of the arbitrators and the other issues of procedural fairness by failing to object before the arbitrators issued their award. The Ninth Circuit did not rely on, or refer to, any evidence on this issue (and the district court made no finding thereon). The court recognized that "[i]t may often be the case that a union member should simply go through the procedures, especially if no objection can possibly change them." Appendix A, page A13. Nevertheless, the court did not review or discuss any of the evidence concerning the lack of any opportunity to make objections, or the futility thereof.

The Ninth Circuit also recognized that the broad authority of a union as the exclusive agent in the administration of a collective bargaining agreement is accompanied by a responsibility of equal scope, i.e., the responsibility and duty of fair representation. (*See* Section III, *infra.*) However, the Ninth Circuit found that the

WGA did not breach its duty of fair representation for several reasons: first, Marino's procedural claims were waived. Second, Marino did not establish that the WGA's conduct was discriminatory, in bad faith or arbitrary. Third, as to the issue of two of the arbitrators' failure to review the evidence, the court found that nothing in the record indicated that the WGA's decision to accept the arbitrators' award was discriminatory, in bad faith, or arbitrary. The Ninth Circuit did not analyze the issue of the arbitrators' failure to read the evidence under the Federal Arbitration Act or the standard of fundamental fairness.

REASONS FOR GRANTING THE WRIT

I. *THE CURRENT PROLIFERATION OF LITIGATION REQUIRES THAT THE COURT DEVELOP AND ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION*

The federal courts are increasingly over-burdened; justice is increasingly threatened. *See* Rehnquist, C.J., *Seen In a Glass Darkly: The Future of the Federal Courts, 1993 WIS. L. REV. 1, 3 (1993).*

> "[I]f we merely proceed along the same path as we have for the last few decades, reacting piecemeal when problems become so overwhelming as to demand attention, we will soon end up with a system that serves neither its beneficiaries nor its participants very well. District courts will be characterized by more bureaucracy, less accountability, and less attention to individual cases. The queue for civil cases will get longer

> and longer because of the number of criminal cases demanding resources and attention. . . . The result will be a decline in the high quality of justice the nation has long expected of the federal courts." *Id.* at 3-4.

One solution is, as Abraham Lincoln said: "Discourage litigation." Burger, W., *American Law Institute Studies on Path to a "Better Way": Litigation alternatives, and Accommodation: Forward,* 1989 DUKE L.J.808 (1989).

An increasingly necessary component of discouraging litigation in federal courts is encouraging alternative dispute resolution. Thus, there is a profound need to develop methods of alternative dispute resolution. Rehnquist, C.J., *Tribute to Leo Levin*, 138 U.PA.L.REV. 317, 318 (1989). Two of the fundamental aspects of developing alternative dispute resolution are to ensure that the processes are just and to encourage potential litigants to employ these processes. The latter aspect relies, to a considerable extent, on the former. Potential litigants must believe that the processes are just before they will submit their disputes to such resolution. Conversely, if potential litigants have little faith in the fairness of alternate dispute resolution procedures, or if they perceive inherent dangers of bias or impartiality in those procedures, they will bring their grievances directly to the courthouse.

This case is about arbitration. If arbitration is to be an effective alternative to litigation in the federal courts, parties initially must believe in the system; then, they must

actually arbitrate their disputes, and still maintain their belief. It is essential, to foster that belief, that the arbitration procedures provide for a fair hearing on the merits[6].

Petitioner does not contend that arbitrations must include full trials pursuant to the rules of civil procedure. Indeed, that would defeat the very purpose of arbitration. However, arbitrations must be *fundamentally fair*, and must provide a minimum level of integrity.

The policy inherent in the Federal Arbitration Act, and in the legal precedents, is to encourage arbitration. But, as the Court stated in *Commonwealth Coatings Corporation v. Continental Casualty Company*, 393 U.S. 145, 147, 21 L.Ed.2d 301, 89 S.Ct. 337 (1968), the intent of the law is not merely to provide for *any* arbitration, but to provide for *impartial* arbitration.

Thus, the purpose of federal arbitration law is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 18 L.Ed.2d 1270, 87 S.Ct. 1801 (1967). "It is no less true in suits brought under § 301 to enforce arbitration awards than in other lawsuits that the 'power of the federal courts to enforce the terms of private agreements is at all times

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[6] *See Los Angeles Times, Auto Owners Want To Have Their Say In Arbitration*, article dated September 3, 1993. (A survey by the California Department of Consumer Affairs of 1,248 Californians who went through arbitration in new-car warranty disputes in 1992 shows that more than half felt the process was unfair. The question of fairness often goes directly to the opportunity to be heard.)

exercised subject to the restrictions and limitations of the public policy of the United States'." *Local 453, International Union of the Electrical, Radio & Machine Workers v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir. 1963), *cert. denied*, 373 U.S. 949, 10 L.Ed.2d 704, 83 S.Ct. 1678 (1963), *quoting Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

Almost two decades ago, the Court stated that "Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimal levels of integrity." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 572, 47 L.Ed.2d 231, 96 S.Ct. 1048 (1976). Unfortunately, since that time, the circuit courts have left the concept of what is fundamentally fair largely undefined, and they have provided no guidelines as to what constitute "minimum levels of integrity." Thus, although it is clear that arbitrations must be fundamentally fair, it is not clear what constitutes a fundamentally fair arbitration procedure.

With mounting public skepticism and lack of confidence in arbitration procedures, and the current explosion in litigation throughout the overburdened federal and state court systems, it is imperative that this Court establish guidelines for these quasi-judicial proceedings which so significantly affect individuals' rights and property. Arbitration provides an important, if not essential, alternative to litigating disputes in the federal courts. This case provides the opportunity for the Court not only to achieve a just result for the parties before it, but to

develop and promote effective alternative dispute resolution.

II. *THE WGA ARBITRATION PROCEDURE IS FUNDAMENTALLY UNFAIR AND PROVIDES NOTHING MORE THAN A SHAM HEARING AND REVIEW.*

Although courts give deference to arbitration awards, the rule "is not equivalent to granting limitless power to the arbitrator." *Georgia-Pacific Corporation v. Local 27, United Paperworkers International Union*, 864 F.2d 940, 944 (1st Cir. 1988). The courts do not forego logic, reason and sound principles of law to give unfettered discretion to arbitrators. *See Advest, Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990).

An arbitration award shall be set aside where the arbitration procedure is inadequate or fails to provide a fair hearing. *See Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1296 (9th Cir. 1982), *cert. denied*, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982). Thus, an arbitration proceeding must be a "fundamentally fair hearing." *Bell Aerospace Co. Div. of Textron, Inc., v. Local 516, UAQ*, 500 F.2d 921, 923 (2d Cir. 1974); *Totem Marine Tug & Barge v. North American Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979). Whether a party had a fair opportunity to be heard depends on "whether he was denied procedural, substantive or evidentiary opportunities" at the arbitration. *See Jeffers v. Convoy Company*, 636 F. Supp. 1337, 1339-40 (D. Minn. 1986).

A. *The WGA Precludes the Parties from Knowing the Identities, Qualifications, Partiality or Bias of the Arbitrators.*

It is established law that bias on the part of an arbitrator invalidates an arbitration award. *Sheet Metal Workers Association v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745-46 (9th Cir. 1985). Accordingly, the Federal Arbitration Act, 9 U.S.C. § 10 (b), provides for vacation of an award "where there was evident partiality or corruption in the arbitrators, or either of them."

In *Commonwealth Coatings*, *supra*, 393 U.S. at 150, the Court stated that arbitrations "not only must be unbiased, but also must avoid the appearance of bias." The Court stated: "We can perceive no way in which the effectiveness of the arbitration will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that *might create an impression of possible bias*" *Id.* at 149 (emphasis added).

Nevertheless, the WGA's rules prevent disclosure of not only the identities of the arbitrators, but also of "any dealings that might create an impression of possible bias." Consequently, the parties are prevented absolutely from ascertaining whether the arbitrators are biased or partial.

It is fundamental to our system of jurisprudence that the parties know who is judging them. Litigants have a right to know the identity of judges assigned to their actions, and have a right to a *voir dire* of jurors. Parties should have the same right in arbitrations. In *Commonwealth Coatings*, the Court wrote:

> "[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id.* at 149.

The WGA's rules, in this regard, vitiate fundamental fairness. The concept of unbiased and impartial determinations of matters affecting the rights of individuals is of basic importance to any fair dispute resolution. The district court's conclusion that Marino was not denied a fundamentally fair hearing is inconsistent with *Commonwealth Coatings*. To the extent that the Ninth Circuit's opinion may imply that the WGA was not required to disclose the identities of the arbitrators to the parties, it also is inconsistent with *Commonwealth Coatings*.[7]

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[7] Although the Ninth Circuit based its holding on the concept of waiver, the court wrote that the WGA's policy of secrecy was supported by considerations such as the need for arbitrators to be free from the dangers of pressure, retaliation and litigation. *See* Appendix A, page A9. The WGA argued that it developed the rule of anonymity in the 1940's due to fear of retaliation on arbitrators. However, there is no evidence in the record of pressure or retaliation on arbitrators in the 1940s, the present, or at any other time. Indeed, there are other industries in which individuals arbitrating disputes between labor and management are subject to very real pressure and retaliation in the form of intimidation and violence. Yet, there is no authority which justifies denying the parties the right to know the arbitrators' identities on this, or any other, basis.

B. *The WGA Arbitration Procedure Deprives Its Members of a Hearing and a Meaningful Opportunity to Be Heard.*

The "universal rule" in arbitrations is that "the parties are entitled to be heard." *Citizens Bldg. of West Palm Beach, Inc., v. Western Union Tel. Co.*, 120 F.2d 982, 984 (5th Cir. 1941). The essence of a hearing is the right to present evidence, and to respond to the evidence presented by an adverse party. *Austin Mun. Securities v. Nat. Ass'n of Securities*, 757 F.2d 676, 691 (5th Cir. 1985) (Arbitration is an "adversarial process, providing a hearing" where the parties have the right to "present evidence" and "cross examine witnesses.") The WGA arbitration policy and practice deprive its members of both of these essential rights, thus violating union members' rights to a meaningful opportunity to be heard.

The WGA's arbitration system does not provide for a hearing. The issue is not just that there is no oral hearing before the arbitration panel, but that there is no process by which parties can offer all of the evidence necessary to support their cases, or hear and respond to their adversaries' cases.

It is axiomatic that a party cannot present his or her entire case, and cannot respond to the case of an adversary, where the party is unaware of the evidence submitted to the arbitrators. As a matter of law, arbitrators cannot receive evidence that is not disclosed to all of the parties. In *Totem Marine, supra*, the Fifth Circuit held that the parties were denied a fundamentally

fair hearing when the arbitrators received evidence *ex parte*: "Arbitrators cannot . . . receive evidence except in the presence of each other and the parties . . . ." 607 F.2d at 653.

In this case, there was no hearing and the WGA did not provide either party with the statements of the other. The arbitrators received that evidence *ex parte*. Consequently, the parties had no opportunity to respond to the evidence presented by the adverse party, and upon which the arbitrators based their decisions.

Furthermore, the right to be heard ordinarily includes a right to cross-examination. *See* 5 Wigmore, *Evidence*, § 1367 (Chadbourn rev. 1974). In a broad sense, cross-examination involves the opportunity to challenge an adversary's evidence. In this case, not only does the WGA arbitration procedure provide no hearing at which a member could cross-examine witnesses, but it does not even allow its members to see the evidence presented by adverse parties.

Furthermore, the WGA arbitration procedure prevents parties from presenting evidence to support their cases. The right to present evidence on issues of fact is a "basic right" in an arbitration. *See Cofinco, Inc. v. Bakrie & Bros. N.V.*, 395 F. Supp. 613, 615 (S.D.N.Y. 1975). Yet, the WGA's rules prevent a party from offering any evidence other than his arbitration statement. Hence, a party may not introduce expert testimony, admissions by an adverse party, testimony of third parties, or other written material relevant to the controversy.

Further, the WGA refused to submit Marino's 1987 treatment to the arbitrators. Consequently, the arbitrators could not evaluate the similarities between Marino's treatment and Coppola's and Puzo's work. The WGA thereby denied Marino an opportunity to offer relevant evidence, contrary to law and to the WGA's own arbitration rules.[8]

Finally, the arbitrators did not even review all the evidence which was before them. Refusal to hear pertinent and material evidence constitutes grounds for vacating an arbitration award, pursuant to the Federal Arbitration Act. 9 U.S.C. § 10(c). Thus, courts vacate arbitration awards "solely" because of an arbitrator's "failure to consider" relevant evidence. *Trailways Lines, Inc. v. Trailways, Inc. Joint Counsel*, 807 F.2d 1416, 1423 (8th Cir. 1986).

In this case, two of the three arbitrators voted against Marino. Both of those arbitrators failed to consider evidence which is material and pertinent to determining screen credit[9]. The arbitrators received thirty-four

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[8] The Screen Credits Manual further provides that if a dispute exists as to the "authenticity, identification, sequence, authorship or completeness of any literary material to be considered in a credit arbitration," the WGA shall conduct a hearing at which the parties may present testimony and documentary evidence. Yet, contrary to its own working rules, the WGA refused to conduct a hearing concerning Marino's 1987 treatment.

[9] Screen credit is determined by an evaluation of each writer's contribution to the final screenplay. Since Coppola was a production executive, he and Puzo had the burden of proving that the final screenplay was 60 percent original to them. An arbitrator cannot possibly

treatments and screenplays on which to base their decisions. The first arbitrator who voted against Marino flatly said he "did not read all thirty-three (sic) scripts." The second arbitrator, who voted against Marino, stated that he did not read "with great thoroughness the stuff which was not relevant." He did not say how he determined what was not relevant without reading the material thoroughly. Further, what he did read he read "with not great scrutiny." The WGA, upon learning these facts, still refused to order a new arbitration.

The Ninth Circuit analyzed the arbitrators' failure adequately to review the evidence in terms of the WGA's duty of fair representation. However, the arbitrators' failure to review all of the evidence constitutes grounds to vacate the arbitration award under the Federal Arbitration Act and under federal common law.

C. *Conclusion*

The WGA arbitration procedure falls far short of the minimum level of integrity necessary for any judicially sanctioned dispute resolution process. The procedure

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determine originality without reading all of the prior literary material. If, as occurred here, an arbitrator reads only Marino's work and Coppola's and Puzo's final screenplay, it will appear that anything which is contained in the final screenplay, but which is not contained in Marino's work, is original to Coppola and Puzo. That conclusion is wrong. All of the sequences, characterizations and dialogue which are based on any of the thirty-one screenplays and treatments written by other writers are not original to Coppola and Puzo. Thus, the failure to read thoroughly the other thirty-one literary materials causes Coppola and Puzo to receive credit for other writers' contributions, to Marino's prejudice.

violates principles which many people consider to be essential to a fundamentally fair hearing. People will refuse to submit substantial disputes to the vagaries and frustrations of such arbitration procedures. The Court should intercede to provide parties with the necessary assurance that the arbitrations will constitute fundamentally fair hearings, and to furnish appropriate standards of fairness and integrity to guide the lower courts.

III. *THE WGA VIOLATED ITS DUTY OF FAIR REPRESENTATION.*

The WGA owes a duty of fair representation to its members, including Marino. The WGA breached its duty in two important ways: first, the WGA adopted and implemented procedures for the arbitration which are arbitrary and discriminatory. In fact, the WGA created and implemented its procedures solely to promote and facilitate the administration of the union, at the expense of one of its member's interests. As this Court stated, in *Wooddell v. Intern. Broth. of Elect. Workers*, ___ U.S. ___, 116 L.Ed.2d 419, 429-430, 112 S.Ct. 494 (1991): "'Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based.'" (*quoting Smith v. Evening News Assn.*, 371 U.S. 195, 200, 9 L.Ed.2d 246, 83 S.Ct. 267 (1962)).

Second, the WGA breached its duty of fair representation by its arbitrary, discriminatory and bad faith

conduct, including its failure to follow its own working rules, and, in doing so, favoring well-known and prominent writers over less established members.

The Court should not countenance such conduct in the administration of quasi-judicial functions such as arbitrations among union members.

A. *The WGA Breached Its Duty of Fair Representation by Sanctioning Arbitrary and Discriminatory Arbitration Practices.*

A union owes each of its members a duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967). This duty requires that the union "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. A union breaches its duty when its conduct is "arbitrary, discriminatory, or in bad faith," as, for example, when it processes a grievance in a "perfunctory fashion." *Id.* at 190-91.

Moreover, "the Union must be careful to protect the interests of all members whom it represents." *Tenorio v. N.L.R.B.*, 680 F.2d 598, 602 (9th Cir. 1982). "The needs of the many do not always outweigh the needs of the few, or the one." *Banks v. Bethlehem Steel Corp.*, 870 F.2d 1438, 1443 (9th Cir. 1989). On the contrary, the duty of fair representation is "calculated to ensure that individual rights of their members are not unduly sacrificed in the pursuit of group goals." *Id.* at 1441.

To satisfy its duty of fair representation, the WGA must ensure that its individual members receive a "fair judgment of the validity of [their] claims." *Id.* at 1443. The WGA breached its duty of fair representation because its arbitration procedures do not ensure that members receive a "fair judgment." *See generally* Section II, *supra*. The WGA's actions in the "Godfather III" arbitration were particularly egregious because the WGA failed even to follow its own policies and procedures. The WGA may not sacrifice the interests of its individual members in a credit arbitration just because it believes that its procedures are in the interest of the WGA as a whole.

B. *The WGA Breached Its Duty of Fair Representation by Its Arbitrary and Discriminatory Conduct.*

The Ninth Circuit erroneously concluded that Marino failed to show discrimination or bad faith on behalf of the WGA[10]. However, there is ample evidence of discriminatory and bad faith conduct by the WGA. In particular, this is evidenced by the WGA's denial of Marino's right to preserve the writers' anonymity. The Ninth Circuit recognized that if Marino requested that the writers be anonymous, it would violate the WGA's rules to deny such anonymity. *See* Appendix A, page A16.

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[10] In connection with the WGA's motion for summary judgment, the issue is not whether Marino affirmatively showed discrimination or bad faith. Rather, the issue is whether, viewing the evidence in a light most favorable to Marino, there was any genuine issue of material fact as to a breach of the WGA's duty of fair representation. *See Tzung v. State Farm Fire & Casualty Company*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

In fact, Marino made four separate requests to maintain the anonymity of the writers. In response, the WGA's Screen Credits Coordinator informed Marino that the writers' identities would not be kept anonymous since "Francis" (i.e. Francis Coppola) had already submitted his statement identifying him as one of the participating writers. Thus, the WGA intentionally refused to maintain the anonymity of the writers.

The WGA also unfairly prevented Marino from submitting his 1987 treatment, and refused to conduct a pre-arbitration hearing on that issue. The element of bad faith is manifest from the reasons underlying the WGA's conduct. The WGA receives money when a member's work is purchased or optioned. The WGA refused to allow Marino to submit his 1987 treatment, which he sent to Coppola before Coppola wrote his script, because it was neither purchased nor optioned. Accordingly, the WGA did not receive any payment in connection with that work. Its refusal to submit this evidence was thus due to the WGA's financial interest, which is irrelevant to the factors at issue in credit determination.

Furthermore, the WGA's rules --and federal law-- require that the arbitrators read all of the literary material, by all of the writers, before making their determination. It is undisputed that the two arbitrators who voted against Marino, and in favor of Coppola and Puzo, did not do so. Yet, contrary to its own rules, the WGA refused to conduct a new arbitration.

Throughout the arbitration process, the WGA discriminated in favor of Coppola and Puzo, who are well-known writers, and acted in bad faith toward Marino, who was not a well-known writer.[11]

IV. *WAIVER DOES NOT APPLY WHERE IT WOULD HAVE BEEN FUTILE TO OBJECT TO THE ARBITRATION PROCEDURE.*

The Ninth Circuit erroneously affirmed summary judgment on the theory that Marino waived the right to attack the WGA's arbitration procedures. The Ninth Circuit's decision is inconsistent with Supreme Court authority, and decisions from other circuits. Moreover, it is not based on any evidence.

A party does not waived an objection where such an objection would be futile. *Glover v. St. Louis-San Francisco Railway Company*, 393 U.S. 324, 329-31, 21 L.Ed.2d 519, 89 S.Ct. 548 (1969); *see also Kitchen Fresh, Inc. v. N.L.R.B.*, 716 F.2d 351, 357 (6th Cir. 1983) ("[A]ny objection before the Board would be futile"

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[11] For example, the Screen Credits Coordinator selected the arbitrators and gave them their instructions. During the course of the arbitration, she failed to return telephone calls from Marino. Although Marino requested that she document all communications to him in writing, she refused to do so. In addition, she facetiously told Marino that she would have to review his arbitration statement to make sure that Marino did not claim to have written "Gone With the Wind." Furthermore, in breach of the WGA's rules, she did not require one of the arbitrators to confirm that decision in writing. The WGA also allowed the tentative credit to go into effect before the arbitration in violation of WGA rules and the MBA. Marino asked the WGA to replace the Screen Credits Coordinator, but the WGA refused to do so.

since the "futility of such an objection" "excuses the petitioner's failure to object to the state of the record"); *United Transportation Union v. Consolidated Rail Corp.*, 881 F.2d 282, 289 (6th Cir. 1989), *vacated on other grounds*, 494 U.S. 1051, 108 L.Ed.2d 757, 110 S.Ct. 1517 (1990) (""[F]utility is an excuse for failure to exhaust internal union remedies. Specifically, employees need not resort to internal union remedies if it would be futile to do so . . . .")

Here, the evidence is undisputed that it would have been futile for Marino to object to the arbitration procedures in issue. The Assistant Executive Director of the WGA testified at her deposition that even if a writer requested that the WGA disclose the arbitrators' names or the adverse party's statement, the WGA would refuse to do so. Further, if the writer objected to the arbitration going forward, the WGA would proceed with the arbitration anyway.

Thus, it would have been futile for Marino to object and, consequently, there can be no waiver. Indeed, there is no evidence in the record to the contrary[12].

Moreover, waiver is an affirmative defense which must be proved by the WGA. *See Sellers v. M. C. Floor Crafters, Inc.*, 842 F.2d 639, 642, n.2 (2d Cir. 1988). In particular, the WGA has the burden of proving "the

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[12] Hence, there is, at least, a genuine issue of material fact as to whether an objection to the WGA's arbitration procedure would have been futile. This alone warrants remanding the case for a determination of this issue on the merits.

availability of adequate internal union remedies." *Beyene v. Coleman Securities Services, Inc.*, 854 F.2d 1179, 1183 (9th Cir. 1988). The WGA offered no evidence that Marino failed to object to the WGA's refusal to disclose the identities of arbitrators, or that adequate internal union remedies were available. There simply is no such evidence in the record. To the contrary, at the first, and only, hearing conducted by the WGA (i.e. the Policy Review Board), Marino requested the identity of the arbitrators, and objected to the arbitration on the grounds that the identities of the arbitrators had not been disclosed.

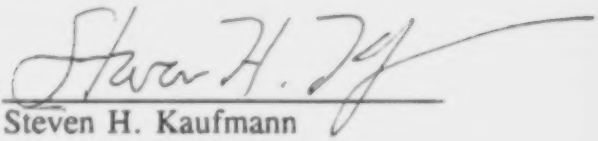
Thus, the Ninth Circuit erred. Marino did not waive the issue of fundamental fairness of the WGA's arbitration procedure. The Ninth Circuit improperly affirmed summary judgment by ignoring significant questions of material fact, and Supreme Court precedent.

If parties to arbitrations, not represented by counsel, are held to lose fundamental rights of procedural fairness because they do not make technical, futile, and formal objections at --what is deemed, with hindsight, to be-- the proper time, they undoubtedly will be discouraged from availing themselves of this alternative form of dispute resolution. It is essential, in developing alternative dispute resolution, that people be assured of their rights to fundamental fairness.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

By: 

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICK MARINO,	)	No. 91-56497
	)	D.C. No.
Plaintiff-Appellant,	)	CV-91-0110-WJR
	)	
v.	)	OPINION
	)	
WRITERS GUILD OF AMERICA, EAST, INC.; WRITERS GUILD OF AMERICA, WEST, INC.; FRANCIS FORD COPPOLA; AND MARIO PUZO,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted
April 6, 1993 -- Pasadena, California

Filed May 12, 1993

Before: J. Clifford Wallace, Chief Judge, Diarmuid F. O'Scannlain and Ferdinand F. Fernandez, Circuit Judges

Opinion of Judge Fernandez

OPINION

FERNANDEZ, Circuit Judge:

Nick Marino appeals the district court's summary judgment in favor of the Writers Guild of America ("WGA"), Francis Coppola and Mario Puzo in Marino's action seeking to vacate an arbitration award. WGA, as arbitrator, awarded screenwriting credit for "Godfather III" to Coppola and Puzo, and not to Marino and his cohort, Thomas Wright. Marino contends that the arbitration procedures used to determine the screen-writing credit were fundamentally unfair. Marino also argues that WGA violated its duty of fair representation by adopting the arbitration procedures and by failing to follow those procedures. Finally, Marino challenges the district court's denial of his request to discover the identities of the arbitrators. We affirm.

BACKGROUND

The WGA is a labor union which was certified as the collective bargaining representative of screenwriters in the movie industry. Marino has been a WGA member since 1985. Pursuant to a collective bargaining agreement between WGA and the employers of writers in the movie industry, WGA determines which writers will receive screen credit for the writing of a screenplay. Both economic benefits and the writer's status in the industry are affected by the receipt of screen credit. Absent the rights set forth in the collective bargaining agreement, the power to allocate credits would be in the hands of the movie producers.

A portion of the collective bargaining agreement titled "Theatrical Schedule A, Theatrical Credits," sets forth the general rules of credit determination. The procedures for arbitration of credit disputes are set out in WGA's "Credits Manual." They are not part of the collective bargaining agreement, but are approved by WGA's board of directors and by vote of its membership. According to the Credits Manual, the arbitration has three phases.

What we will call the first phase is a procedure through which common factual disputes can be resolved. If there are disputes as to "authenticity, identification, sequence, authorship or completeness of any literary material to be considered" a special committee conducts "a hearing at which all participating writers may present testimony and documentary evidence." Manual, Credit Determination Procedure § D.4. That committee's factual determination is binding and forms a part of the basis of the material that goes to those who conduct the second phase of the process.

The second phase of the process is conducted by the use of three individuals, called arbiters. Unlike the decision makers in the first phase, the arbiters do not hear oral testimony or argument. They read and cogitate. Their task is to decide who should get screen credit for the screenplay. Their names are kept confidential from the public, the participating writers, and even from one another. CDP § D.1. Each arbiter makes this difficult decision on creativity in isolation and based upon written materials. Those are materials submitted by the film company and they include "all material written by

participants as well as . . . source material." CDP § D.3. The participating writers are encouraged to review that material and may ask that appropriate materials be added. A participating writer may also submit a position statement for the purpose of helping the arbiters in their consideration of the written materials. *Id.* Writers are encouraged to do so. Each arbiter then makes a decision and notifies the Credit Arbitration Secretary. A majority decides the question. After the arbiters have made their decision, the participating writers are informed and the third phase becomes available.

The third phase is a review procedure. Within twenty-four hours of notification of the credit determination, any of the writers involved may request a review by a Policy Review Board ("PRB"). CDP § D.5. The PRB's scope of review is limited to determining whether there has been "any serious deviation from the policy of the Guild or the procedure as set forth in this Manual." More specifically, the PRB may consider questions involving dereliction of duty on the part of the arbiters, or any of them, any use of undue influence upon the arbiters, any misinterpretation, misapplication, or violation of WGA policies, and any "[i]mportant new written material" which was, for valid reasons, not previously available. *Id.* The PRB has the authority to direct the original three arbiters to reconsider the case or to order a new proceeding. The entire arbitration process must occur within 21 business days. If it does not, the producer's own selection may become final.

In 1985, Marino and Wright wrote an adaptation of literary material, referred to as a treatment, for Godfather III,'' which Paramount Pictures Corporation ("Paramount") purchased.[1]

Paramount hired Marino to write a motion picture script, or screenplay, based on the treatment. Marino completed the screenplay in 1985, but Paramount chose not to produce it at that time.

In 1987, Marino wrote a second treatment and sent it to executives at a production studio owned by Coppola and related to the prior "Godfather" pictures. The production studio neither solicited nor purchased Marino's 1987 treatment. In 1989 and 1990, Coppola and Puzo co-wrote a screenplay for "Godfather III." The movie was produced and completed in 1990.

Before the movie was distributed, Marino was notified that WGA would be conducting an arbitration to determine the writing credits for "Godfather III," pursuant to the collective bargaining agreement. Accordingly, Marino, Coppola and Puzo submitted written materials and statements for the arbiters' review.[2] On November 5, 1990, the Arbitration Secretary informed Marino that

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[1] Wright is not an appellant and was not a plaintiff in the district court. Thus, we will generally refer to Marino only, even though Wright participated in the arbitration itself.

[2] Although materials from other writers were submitted to the arbiters, only Marino, Coppola and Puzo were seeking credit.

Coppola and Puzo would receive sole writing credit. Marino requested a hearing before the PRB where he objected to the arbitration procedure. The PRB telephoned the three arbiters and presented Marino's allegations to them. The PRB discovered that one arbiter had not read Marino's 1985 treatment. That arbiter was sent the 1985 treatment for review, and the arbiter then reaffirmed the prior conclusion. In a letter dated November 21, 1990, the PRB informed Marino that a new arbitration was unnecessary and at the arbitration decision was final.

Marino then filed this action in state court in which he sought to vacate the arbitration award and to obtain declaratory relief. The action was removed to district court on grounds that the proceedings were governed by a collective bargaining agreement and preempted by federal labor law. WGA moved for summary judgment as did Marino. On October 25, 1991, after a hearing, the district court granted WGA summary judgment.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1337, and we have jurisdiction under 28 U.S C. § 1291.

The granting of summary judgment is reviewed de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937, 110 S.Ct. 3217, 10 L. Ed. 2d 664 (1990). This court, viewing the evidence in the light most favorable to the opposing party, must determine whether there are any genuine issues of material fact and whether the district

court correctly applied the substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

DISCUSSION

Marino makes a number of attacks upon the arbitration procedures in general and upon their particular application to this case. A number of those revolve around his claim that it is fundamentally unfair to keep the identities of the arbiters confidential. That has the potential, he says, for concealing bias. Moreover, the result is that he cannot appear before them or cross examine witnesses before them. As we will explain, Marino waived the right to mount this group of attacks.

He also asserts that the procedures were applied to him in an improper manner. He claims that he was refused the right to have the participating writers remain anonymous, that he was prevented from submitting what he deemed to be relevant evidence, that he was unable to see the other writers' written submissions, that the arbiters considered evidence that they should not have, and did not consider evidence that they should have.

A. *Waiver; the Anonymity Claims.*

Arbitration is a favored method for the resolution of disputes, particularly in the labor area. *See United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S. Ct. 1358, 1360, 4 L. Ed. 2d 1424 (1960). It is undoubtedly true that all notions of procedural fairness cannot be jettisoned simply because the

parties have agreed to arbitrate. *See Sunshine Mining Co. v. United Steelworkers of Am.*, 823 F.2d 1289, 1295 (9th Cir. 1987). However, because arbitration is contractual, rather than imposed by law, what we have come to see as the hallmarks of judicial justice are not necessarily required in arbitral justice. *See id.; Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991). One reason is that arbitration can take account of unique problems. Arbitration can supply high-powered expertise to a particular and narrow area--such as deciding who should get credit for creating an imaginative work. At the same time, it can supply unique ways for avoiding the kinds of biases and pressures that judges are all too aware of. Lifetime appointments help insulate federal judges from those vices, arbitration procedures may offer other ways.

If arbitration is to work, it must not be subjected to undue judicial interference. *See* 9 U.S.C. §10; *Stead Motors v. Automotive Mach. Lodge No. 1173*, 886 F.2d 1200-09 (9th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 946, 110 S.Ct. 2205, 109 L.Ed.2d (1990). Moreover, parties must be encouraged, nay required, to raise their complaints about the arbitration during the arbitration process itself, when that is possible.

Thus, it is well settled that a party may not sit idle through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse. *See United Steelworkers of Am. Smoke-Craft. Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021,

102 S. Ct. 1718, 72 L. Ed. 2d 139 (1982). This rule even extends to questions, such as arbitrator bias, that go to the very heart of arbitral fairness. *See Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1317 (9th Cir. 1990) (plaintiffs' failure to exhaust grievance procedures not excused because of alleged lack of neutrality of arbitration), *cert. denied* ___ U.S. ___, 111 S. Ct. 957, 112 L.Ed.2d 1045 1991); *Sheet Metal Workers Int'l Ass'n v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985) ("Kinney") (plaintiff not allowed to challenge composition of arbitration award unless plaintiff objected when they were seated); *Kodiak Oil Field Haulers, Inc. v. Teamsters Union Local No. 959*, 611 F.2d 1286, 1290 (9th Cir. 1980) (plaintiff did not object to alleged bias of an arbitrator at the time Board of Arbitration was convened and thus, issue waived).

This rule applies when there is an objection to the adequacy or form of procedures used in commercial arbitration. *See Todd Shipyards Corp.*, 943 F.2d 1063-64. It also applies when is claimed that a labor arbitration was not fairly conducted. *See Kinney*, 756 F.2d at 746. It is no less applicable when the claim is phrased in terms of a violation of the duty of fair representation. *See Carr*, 904 F.2d at 1317.

Here, the major thrust of Marino's objection is his assertion that WGA precluded him from ascertaining the qualifications or partiality of the arbiters. The WGA's refusal to disclose the arbiters' identity was pursuant to the procedures which we have outlined. Under the procedures, "[a]s has always been [WGA] practice, the

names of the arbiters selected remain confidential." CDP § D.1. WGA's confidentiality policy is "supported by important and legitimate considerations, including the necessity that arbitrators be entirely freed from both real and perceived dangers of pressure, retaliation, and litigation." *Ferguson v. Writers Guild of Am. W. Inc.*, 226 Cal. App. 3d 1382, 1391 (Cal. Ct. App. 1991) (upholding WGA's confidentiality policy).

The procedures allow the participating writers to strike a reasonable number of names from the list of arbiters. The list is long, and if one did not have substantial familiarity with the writing community, it may be well nigh impossible to ferret out possible bias in all of the persons on it. Still, Marino, without objection, took advantage of that opportunity. Between him and Wright, 85 names were stricken. From the remaining names on the list, three arbiters were chosen. Each potential arbiter was screened for potential bias by an arbitration coordinator.

While the notion of an anonymous judge may jar those who are used to judicial proceedings, no doubt WGA and its members understand the practical difficulties involved in having the arbiters' names disclosed. Very important people may be unhappy with a decision and may be in a good position to pressure or take revenge against the arbiters. Moreover, the WGA and its members have decided that the best arbiters will be experienced working members of the screenwriters community. The heavy responsibility of the arbiter's mantle might well be declined by hard-working writers if they knew that they

could be hauled through recriminatory judicial proceedings, accused of bias, and the like. The procedures that reflected and dealt with these concerns had existed for decades. They were grounded on the collective bargaining agreement and were designed to implement its terms. Presumably they were fair. *See Kinney*, 756 F.2d at 746.

In the face of this, Marino made no objection until the arbiters had found against him. Presumably the procedure was satisfactory to him, just as it was to the other members of the WGA. That is, it was satisfactory to him until the arbiters' decision went against him.

It is important to notice that Marino's attack on the anonymity of the arbiters, and the other concomitants of that anonymity, is very much like a claim of arbitrator bias. In fact, its central proposition is that the arbiters might be biased against him but he cannot tell for sure because he does not *know* whom they are. Of course, he cannot know for sure whether they are biased or not because he has not had an opportunity to investigate or grill them on that issue. Nevertheless, the claim is a bias claim at root. We hold that this claim, like that of actual bias, was waived when Marino failed protest the procedure before the arbiters were selected and performed their task. A claim of true bias can be considered and dealt with before individuals have invested their time and decided the case. So too could this claim have been taken account of. Here the individuals who were being asked to decide a knotty screen credit question with celerity and certainty could have been informed that their impartiality and

qualifications were being challenged. The WGA could have taken steps to ameliorate *those* claims. Just as importantly, the prospective arbiters, once being made aware of the claims, could have decided that they did not wish to become a part of a process which is, as the Manual says, "arduous and unpleasant." Perhaps individuals who had no objection to disclosure of their names could be found. We do not know. What we do know is that this bias issue, like others, should have been raised before the arbiters acted, not after. We understand Marino's focus on what he perceives as an issue of fairness himself. We, however, must focus on fairness to all involved, including the arbiters and all of the other union members and officers who have relied on the arbitration process for so long.

As we see it, Marino's complaint of his inability to have a face-to-face hearing before the arbiters, complete with cross-examination--issues also not raised before his loss--must fall with the anonymity claim. They are its accompaniments.

We hasten to add two additional thoughts. We recognize that it would be possible to create a procedure so palpably unfair on its face that no prior objection should be expected or required. An anonymous coin toss might be an example of that. On the record before us, that is *not* the procedure we are dealing with. While Marino focuses on the arbiters' phase of the process, he loses sight of the overall arbitration process itself. He ignores the phase one evidentiary hearing process and likewise ignores the phase three procedural review process. The former,

of course, provides for all of the usual confrontation and evidentiary rights. The latter provides some assurance of procedural fairness. Marino's claim that he is not in a position to assert procedural problems because he did not appear before the arbiters is not persuasive. He did assert problems. As we will soon discuss, they were dealt with. Also, while it is true that the arbiters could have failed to consider materials or proceeded to commit other wrongs in a hidden way, that could occur despite hearings and despite knowledge of the arbiters' identities. In effect, Marino's claims in this regard do, once again, come back to the single issue of arbiter anonymity.

In a similar vein, we do not hold that every possible endemic procedural defect must be raised in advance or waived. We need not, and should not, sweep that broadly. It may often be the case that a union member should simply go through the provided procedures, especially if no objection can possibly change them. *Cf. Carr*, 904 F.2d at 1317-18. In *Carr*, for example, the plaintiffs claimed that the grievance procedures were flawed because they did not provide for discovery or representation by counsel, among other things. There we said that "at a minimum" the plaintiffs should have presented and prosecuted their claims through the contractual procedures despite their assertions of inadequacy. *Id.* at 1318. We did not decide whether a failure to object to those procedures in advance would have waived the claims. Similarly, we do not now decide that question, or others like it.

B. *Duty of Fair Representation; the Other Claims.*

In addition to his assault on the heartland of the arbitration procedure--anonymity--Marino has raised a number of claims about the handling of the "Godfather III" proceeding. He asserts that in handling this proceeding, WGA breached its duty of fair representation.

[4] "The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Humphrey v. Moore*, 375 U.S. 335, 342, 84 S.Ct. 363, 368, 11 L.Ed.2d 370 (1964). "Unions have broad discretion to act in what they perceive to be their members' interests. This court has construed the unfair representation doctrine in a manner designed to protect that discretion." *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988) (citation omitted).

> This court engages in a two-step analysis to determine whether a union has breached the duty of fair representation. First, we must decide whether the alleged union misconduct "involved the union's judgment, or whether it was 'procedural or ministerial.'" Second, if the conduct was procedural or ministerial, then the plaintiff may prevail if the union's conduct was arbitrary, discriminatory, or in bad faith. However, if the conduct involved the

> union's judgment, then "the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith."

Burkevich v. Air Line Pilots Ass'n, Int'l, 894 F.2d 346, 349 (9th Cir. 1990) (citations omitted); *Moore*, 840 F.2d at 636; *see also Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967) (to establish a breach of the duty of fair representation, a union member must show that the union's conduct towards him was "arbitrary, discriminatory, or in bad faith"). Mere negligence is not sufficient. To be arbitrary, [t]he union must have acted in 'reckless disregard' of the [union member's] rights." *Moore*, 840 F.2d at 636. The union's duty of fair representation extends to its negotiation activities. *Air Line Pilots Ass'n Int'l v. O'Neill*, ___ U.S.___, 111 S.Ct. 1127, 1135, 113 L.Ed.2d 51 (1991).

Marino's claims raise a potpourri of fair representation issues, some of which relate to judgment and others of which are procedural in nature. All of them, he says, should result in the overturning of the arbitration award. We will consider each of them.

He begins by asserting that the whole procedure is fundamentally unfair. *See Sunshine Mining Co.*, 823 F.2d at 1295. Of course, the adoption of procedures is a matter of judgment. For the most part, this is just another iteration of his waived complaint about arbiter anonymity. Thus, it must fail. He does, however, add yet another complaint. He says he was not given an opportunity to reply to the written statements of the other participating

writers because he could not see those statements. The Manual does preclude that opportunity. *See* CDP § D.4(b). However, the statements are supposed to be just that--mere statements and not evidence. We see no fundamental unfairness. When time is of the essence, as it is in credit determinations, the receipt of simultaneous briefs is not a shocking development by any means. That certainly would justify the decision not to allow replies. We are somewhat more concerned about the requirement that the statements remain confidential; replies could be denied or discouraged, without that added stricture. However, it can hardly said that this alone makes the procedure discriminatory or in bad faith. It is simply a part of an approach to speedy decision making that the writers have long since adopted. At any rate, Marino was given a copy of the Coppola and Puzo statement during discovery in the district court proceedings. His failure to bring any actual problems to that court's attention suggests that he did not suffer prejudice to a strong interest of a kind that can justify a determination that the duty of fair representation was breached. *See Moore*, 840 F.2d at 636.

Marino next claims that he was denied the right to have the identifies of the writers remain anonymous. The Manual clearly provides that, upon request, the identities of all participating writers will be kept from the arbiters. CDP § D.3. He asserts that he demanded that right but was told by the Screen Credits Coordinator that he could not have anonymity. That, if so, would itself be a procedural violation. However, it was exactly the kind of

issue that the third phase of the arbitration procedure was designed to deal with. Marino brought this problem to the attention of the PRB. That body did not ignore claim. Rather, it appears that the PRB conducted an investigation and questioned the Arbitration Coordinator. It then determined that Marino never requested an anonymous arbitration despite many opportunities to do so over a lengthy period. The PRB examined Marino's written statements submitted to the arbiters and noticed that Marino had included his own name. There was no evidence that Marino's materials included a statement that he was submitting his name under protest. The PRB then decided that his rights were not compromised.

Although there might have been a factual dispute as to whether Marino actually requested anonymity, the fact that a dispute exists does not establish that WGA's conduct was discriminatory or in bad faith. Nor, for that matter, does it indicate that it was arbitrary. *See Moore*, 840 F.2d at 637; *Vaca*, 386 U.S. at 190, 87 S.Ct. at 916. In fact, it appears that the WGA considered Marino's complaint in a manner far from perfunctory. After investigating the allegation, it reached a reasoned conclusion. In sum, we see no grounds to overturn that arbitral decision. Similarly, to the extent it reflects an exercise of judgment by the WGA, we find no breach of the duty of fair representation.

Next, Marino asserts that he was prevented from submitting certain evidence that he deemed to be important--that is, his 1987 treatment. He says that he sought to have a phase one hearing on that subject but was

denied it. He raised this issue before the PRB and it explained that because Marino "was not employed by a signatory company to write [the] treatment and it was not purchased or licensed by a signatory company," that treatment was not under the jurisdiction of the WGA. Given that, it said, the material could not be considered. Because those facts were admitted by Marino, there was no need to hold an evidentiary hearing regarding them.

Even if other interpretations of the collective bargaining agreement would have been plausible, there is nothing to indicate that this decision was discriminatory or made in bad faith. There is no indication that it was a recent or idiosyncratic interpretation designed for the purpose of injuring Marino. In short, the making of that decision does not show that the WGA violated its duty of fair representation.

Marino then claims that the arbiters failed to review the materials submitted to them, and reviewed materials not submitted to them. In particular, he says that the WGA should have ordered a new arbitration when it ascertained that (1) two of the arbiters did not read the literary material thoroughly, and (2) the arbiters considered the predecessor "Godfather" movies and Puzo's novel, "The Godfather." These contentions involve the exercise of the WGA's judgment, and, therefore, Marino must show that the WGA's decisions were made discriminatorily or in bad faith. *See Burkevich*, 894 F.2d at 349-50.

Two arbiters did indicate that they focused their attention mostly on the writings offered by Marino, Wright, Coppola, and Puzo, as opposed to the several other submissions from writers who were not seeking credit. They said they did so because these four were the only parties vying for screen credits. If anything, that would seem to inure to Marino's benefit. Certainly it does not establish that his work was glossed over. It is not at all apparent that he was prejudiced and he has not shown that he was. *See Moore*, 840 F.2d at 36 (union's conduct must prejudice a strong interest of the union member). Moreover, nothing in the record indicates that WGA's decision to accept the arbiters' award was discriminatory or in bad faith. *See Burkevich*, 894 F.2d at 352 (union's judgment call, even if poorly made, does not constitute breach of duty of fair representation). Marino also asserts that one arbiter at first failed to read his 1985 treatment. This PRB investigated this allegation, agreed with Marino, and corrected the problem. That does not smack of discrimination or bad faith; it tends to show that the process was working properly. *See Vaca*, 386 U.S. at 194, 87 S. Ct. at 919.

Finally, Marino states, the arbiters improperly considered ex parte evidence, specifically the predecessor "Godfather" movies and the book. Under the Procedures, "the Arbitration Committee bases its decision on the written scripts, including story and source material." CDP § D3. According to WGA, "source material" includes material from the book and from the previous movies to which "Godfather III" is the sequel. Moreover, Marino

made references to the predecessor movies in his own written statement. One wonders how that really could be avoided. It appears disingenuous of him to contend now that the arbiters improperly considered that material. Again, no discrimination or bad faith is shown.

Marino argues that the district court erred by denying his discovery request that the arbiters' identities be revealed. He asserts that identification was necessary if he was to determine whether the arbiters were properly qualified and whether they were biased or partial.

The district court committed no error. As we have already held, the arbiter anonymity issue has been waived. It cannot be resurrected through the use of a discovery order. That information, under the circumstances of this case, was not relevant. *See* Fed. R. Civ. P. 26(b).

CONCLUSION

Movies are expensive creative works. Once they are ready for release their owners wish to move quickly. When the WGA wrested the unilateral power to decide screen credits from the producers, it did so at the price of an agreement that WGA itself would move quickly. The need for speed is part of the right it negotiated for on behalf of its members. That need drives the whole process; in the absence of quick determinations, it is likely that the right itself would wither away.

The procedures adopted by WGA were designed to make the difficult screen credit decision in a speedy and fair fashion. Although the three-phase arbitration

procedure is not the same as the more deliberate judicial procedures that we are accustomed to, this case helps show why it cannot be. "Godfather III" was released over three years ago, and only now is the second phase of federal judicial procedures moving toward completion. That is not the fault of the parties or of the judicial system. Our procedures require time; other needs demand other procedures.

On this record, and based upon the issues properly before us for decision, we cannot say that the procedures designed for speed overwhelmed the ideal of justice.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NICK MARINO, Plaintiff-Appellant, v. WRITERS GUILD OF AMERICA, EAST, INC.; WRITERS GUILD OF AMERICA, WEST, INC.; FRANCIS F. COPPOLA AND MARIO PUZO. Defendants-Appellees.	)	No. 91-56497 D.C. No. CV-91-0110-WJR STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

This cause came on regularly for hearing on September 9, 1991, on the motion for summary judgment of defendants Writers Guild of America, West, Inc., Mario Puzo, and Francis Ford Coppola, and the cross-motion for summary judgment of plaintiff Nick Marino, with the Honorable William J. Rea, Judge, presiding. Julius Reich and J. David Sackman appeared as counsel for defendants, and Gary E. Gans appeared as counsel for plaintiff.

The Court having reviewed the declarations, points and authorities, and plaintiff's motion to strike and evidentiary objections to the declarations of Brian Walton and Ann Migden, and having heard the arguments offered by the parties, and the cause having been submitted for decision, the Court being fully advised in the premises makes its

determination of uncontroverted facts and conclusion of law as follows:

STATEMENT OF UNCONTROVERTED FACTS

It is an uncontroverted fact that:

1. The plaintiff, Nick Marino, is a writer and a member of defendant Writers Guild of America, West, Inc. (Guild).

2. The Guild is a labor union representing writers in the motion picture and television industries and is the successor labor union to the Screen Writers Guild, which was certified by the National Labor Relations Board in 1938 as the collective bargaining representative of screen writers in the motion picture industry.

3. The defendants Mario Puzo and Francis Ford Coppola are screen writers represented for purposes of collective bargaining by the Guild.

4. The Guild is party to a collective bargaining agreement, the Minimum Basic Agreement (MBA), with various motion picture production companies, including Paramount Pictures Corporation (Paramount).

5. One of the factors which led to the organization of the Guild and its predecessor, the Screen Writers Guild, was the perception that motion picture producers sometimes assigned screen writing credit on the basis of nepotism, favoritism, and friendship. In its first MBA in 1940, the Guild's predecessor reserved to itself the right

to determine screen credits for writing, and that right has continued to the present MBA.

6. The rules for determining credits where there is a dispute are contained in the MBA and in the Guild's Screen Credits Manual (Manual), which are periodically approved by vote of the Guild's membership.

7. The MBA requires that a motion picture producer submit to the Guild a list of tentative screen credits upon the completion of a motion picture. Thereafter, the Guild or any participating writer may protest the tentative credits and seek a determination by the Guild. In some cases, such as where a production executive is proposed for writing credit, the MBA provides for an automatic credit determination by the Guild.

8. Under the MBA, as well as under the Manual, credit determinations (also called credit arbitrations) are made by a committee of three professional screen writers. The committee members are selected by the Guild's Screen Credits Coordinator from a list of Guild members who are experienced screen writers and who have volunteered to act as arbiters. Another experienced screen writer acts as a consultant to the committee on questions of policy, procedure, and precedents. Neither the arbiters nor the consultants receive any compensation for their services and they act with a commitment (contained in the Manual) that their identities will remain confidential from the participants, as well as, in the case of the arbiters, from one another.

9. In cases where there is a factual dispute as to the authenticity or sequence of any literary material to be considered in a credits determination, the Manual provides for a pre-arbitration hearing at which participating writers may attend and present testimony and documentary evidence. The pre-arbitration hearing is before a different panel of three experienced screen writers whose function it is to resolve factual disputes before submitting the matter to the arbiters who are to determine the screen credits issues.

10. After the issue of writing credits has been submitted to the arbiters and they arrive at a majority decision, upon a participant's request the decision is reviewable by a three-person Policy Review Board to determine if there has been any serious deviation from the policy of the Guild or the procedures contained in the Manual. If a violation is found, the Policy Review Board may direct the arbiters to reconsider the case, or may direct the formation of a new committee to re-determine writing credits.

11. In connection with the motion picture, "Godfather III," Paramount employed a number of individuals to write literary material, among whom were Nick Marino, Thomas Lee Wright, Mario Puzo, and Francis Ford Coppola.

12. When the final shooting script (the script from which the motion picture is filmed) for "Godfather III" was completed, in accordance with its obligations under the MBA Paramount submitted to each participating writer

and to the Guild a Notice of Tentative Credits, which listed the screen credits the company proposed giving to participants to denote their contribution to the film.

13. Paramount's Notice of Tentative Credits for "Godfather III" included the following proposed credit: "Written by Mario Puzo & Francis Ford Coppola."

14. Because Francis Ford Coppola was a production executive on "Godfather III" and was also listed tentatively as a writer of the screenplay, an automatic credit determination was conducted by the Guild.

15. Following the filing by Paramount of the Notice of Tentative Credits, a committee of arbiters was selected by the Guild's Screen Credits Coordinator.

16. The arbiters were then furnished all of the written material, including the shooting script, in connection with "Godfather III." A majority of the arbiters ruled that the writing credit for "Godfather III" should be: "Written by Mario Puzo & Francis Ford Coppola."

17. Marino and Thomas Lee Wright appealed the decision of the arbiters to the Policy Review Board, which reviewed the conduct of the screen credits determination and ruled against Marino and Wright, upholding the decision of the arbiters.

The following Conclusions of Law, insofar as they may be considered facts, are so found by this Court to be uncontroverted in all respects; and the foregoing Statement of Uncontroverted Facts, insofar as they may contain

Conclusions of Law, are so concluded from the Statement of Uncontroverted Facts.

From the foregoing facts the Court makes the following

CONCLUSIONS OF LAW

1. The Guild is a labor union representing employees for purposes of collective bargaining in the motion picture and television industries.

2. The Guild owes to individuals it represents, such as Marino, a duty of fair representation in administering and enforcing the MBA.

3. The Guild's screen credits determination system effectively constitutes an arbitration of screen credits, and the final decision of the arbiters constitutes an arbitration award subject to Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a).

4. The adoption by the Guild of its screen credits determination rules, including the rule of maintaining the anonymity of the arbiters, did not breach the Guild's duty of fair representation in that the rules were not arbitrary, discriminatory, or adopted in bad faith. The Guild has unique disputes and it was entitled to devise and implement this unique credits determination system, for which it negotiated with the motion picture production companies and which was adopted by its members. *See Air Line Pilots Association v. O'Neill*, ___ U.S. ___,

111 S.Ct. 1127, 1134-35, 113 L.Ed.2d 51 (1991) (union's duty of fair representation applies to contract negotiation, administration, and enforcement); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953) ("A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents); *see also Ferguson v. Writers Guild of America, West, Inc.*, 226 Cal.App.3d 1382, 277 Cal. Rptr. 450 (1991).

5. An arbitration award may be vacated if a union breached its duty of fair representation in connection with the arbitration proceeding, *see Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976), or if the proceedings which culminated in the award were not fundamentally fair. "A hearing is fundamentally fair if its meets 'the minimal requirements of fairness'--adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator." *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir. 1987) (citation omitted).

6. The Guild adequately followed its arbitration procedures in a non-arbitrary or discriminatory fashion, and there is no evidence that the Guild breached its duty of fair representation.

7. There is no evidence that Marino was denied a fundamentally fair hearing. Arbitration proceedings are not required to comport with strict due process rights and evidentiary requirements of a court proceeding. *See*

Sunshine Mining Co. v. United Steelworkers, 823 F.2d 1289, 1295 (9th Cir. 1987).

8. As long as the arbiters even arguably construed or applied the arbitration proceedings adopted in the MBA, as they did in this case, this Court may not vacate the arbiters' factual findings or the arbiters' interpretation of the rules of arbitration as adopted in the MBA. *See Van Waters & Rogers Inc. v. International Brotherhood of Teamsters, Local 70*, 913 F.2d 736 (9th Cir. 1990).

9. Marino has not set forth the particular facts which he expects to obtain from further discovery, *see Brae Trans., Inc. v. Coopers & Lybrand*, 790 F.2d 1439 (9th Cir. 1986), and absent such a showing, the defendant's motion for summary judgment is based upon the documentation currently submitted by the parties.

10. There is no genuine issue as to any material fact, and the defendants are each entitled to judgment as a matter of law.

Dated: October 19, 1991

/s/ W. J. Rea
WILLIAM J. REA
United States District Judge

Supreme Court, U.S.
FILED
OCT 25 1993
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No. 93-509

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NICK MARINO,
Petitioner,
v.
WRITERS GUILD OF AMERICA, WEST, INC., FRANCIS FORD COPPOLA, and MARIO PUZO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Respondents disagree with the Questions Presented in the petition for certiorari, as being argumentative. Instead, respondents submit that the Questions Presented should be stated as follows:

1. Did the Ninth Circuit correctly hold that petitioner Nick Marino (Marino) waived his objections to alleged defects in the arbitration procedure, by failing to raise those objections before the arbitration?

2. Did respondent Writers Guild of America, west, Inc. (Guild) breach its duty of fair representation in *negotiating* the screen credits determination system under which Marino's contribution to a motion picture was evaluated, and was the claim of breach made within the applicable limitations period?

3. Did the Guild breach its duty of fair representation in *administering* the screen credits determination system in this case?

4. Does the Guild's screen credits determination system, in which the substantive decision of screen credit is determined by a panel of the writers' peers who are guaranteed anonymity from the participants and the public, comport with the fundamental fairness required of arbitration proceedings under a collective bargaining agreement, pursuant to 29 U.S.C. §§ 173(d) and 185(a)?

CORPORATE DISCLOSURE STATEMENT (RULE 29.1)

Respondent Guild is a California non-profit corporation. There are no parent companies or subsidiaries of the Guild that have issued shares to the public. The Guild is affiliated with Writers Guild of America, East, Inc.; Writers Guild of Canada; Australian Writers Guild; New Zealand Writers' Guild, Inc.; Societe des Auteurs, Recherchistes, Documentalistes et Compositeurs; and Writers' Guild of Great Britain.

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OPPOSITION TO PETITION FOR CERTIORARI

STATUTES INVOLVED

Labor Management Relations Act (LMRA) § 203(d), 29 U.S.C. § 173(d) provides in relevant part:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

LMRA § 301(a), 29 U.S.C. § 185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United

States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Petitioner Marino challenges the screen credits determination system negotiated and administered by respondent Writers Guild of America, west, Inc. (Guild) to determine which writer or writers participating in the development of a motion picture were to receive screen credit.

This system was originally developed over 50 years ago when the Guild first negotiated with the producers the right to conduct screen credits determinations. Previously, the producers had unilaterally determined screen credits. That 1940 collective bargaining agreement, as well as the succeeding ones, including the 1985 Minimum Basic Agreement (MBA) applicable to these proceedings, each ceded to the Guild the right to conduct screen credits determinations, subject to certain limitations. The MBA adopts by reference the Guild's procedures and provides that the results are binding on the producers and writers involved. These procedures are contained in the Guild's Screen Credits Manual, which is adopted and amended through the internal democratic procedures of the Guild.

Marino's main attack is against the central feature of these procedures—the anonymity of the writers who are chosen to decide the question of screen authorship. The writers who comprise the Guild decided that these disputes over credits should be determined by their peers—fellow writers. To avoid influence from participants, the identity of the arbiters is not revealed. Instead, the names of all eligible arbiters are contained on a list given to the participants to a dispute, and each participant is allowed to strike a reasonable number of names from the list. A representative of the Guild then selects the arbitral panel

from the remaining names, after questioning each potential arbiter on possible bias.

The petition's Statement of the Case contains numerous misstatements regarding these procedures and their application to Marino. Several of these misstatements arise from the fact that the procedure is divided into three parts: (1) a pre-arbitration hearing in which factual issues are resolved after a hearing which each party may attend and which decides which written materials are to be submitted to the arbiters; (2) the substantive decision by a panel of three arbiter/writers who deliberate on the undisputed written materials submitted to them; and (3) a Policy Review Board which reviews any claimed procedural violations, including claims of undue influence on, or dereliction of duty by the arbiters. This is described in more detail in the decision of the Ninth Circuit, reprinted as Appendix A to the Petition for Writ of Certiorari at A-3 to A-4.

Marino cites the lack of procedural safeguards, such as a hearing on the merits. These safeguards in fact exist, but they have been divided among the three parts of the procedure. For example, a full hearing may be held in the pre-arbitration phase, at which any relevant factual disputes are resolved. The facts and materials as established at that hearing or by agreement among the participants are then submitted to the panel of arbiter/writers in the second phase, who review the written material in private, away from both the participants and each other.

Several of the alleged deficiencies referred to by Marino were actually procedural issues decided by the Policy Review Board on appeal. The allegation that the parties are precluded from submitting relevant evidence refers to the decision by the Guild, upheld by the Policy Review Board, to exclude a writing by Marino which was not written under the MBA; therefore, not within the Guild's jurisdiction. The alleged failure to keep the identity of the competing writers anonymous was another issue

raised before the Policy Review Board, which investigated the claim and determined that although Marino had a right to request anonymity, he had not done so. The allegation that the Policy Review Board failed to order a new arbitration after finding that one arbiter (not two, as Marino claims) did not read all the material submitted, is incorrect. The Policy Review Board in fact remanded the materials to that arbiter for a complete reading and a redetermination.

Marino also states that evidence was received ex parte. This refers to the consideration by the arbiters of a book and two previous motion pictures in the series, all of which was, as found by the Ninth Circuit, "source material" under the Screen Credits Manual, which the Manual authorizes the arbiters to consider.

After the screen credits determination was decided against Marino, he filed this action in state court to vacate the award. The action was removed to the district court based on jurisdiction under LMRA § 301(a), 29 U.S.C. § 185(a). The district court ruled against Marino in cross-motions for summary judgment, and that judgment was affirmed by the Ninth Circuit. This petition followed the denial of Marino's petition for rehearing to the Ninth Circuit.

SUMMARY OF ARGUMENT

This is an action to vacate an arbitration award under a collective bargaining agreement governed by LMRA § 301(a), 29 U.S.C. § 185(a). There is no conflict among the circuits or with any decision of this Court in the issues decided below. The Ninth Circuit and the district court applied established legal standards to a factually unique situation. The arbitration system here was designed to deal only with a specific type dispute—screen credits—under one collective bargaining agreement. The courts below wisely left the determination of screen credits to the writers themselves.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

This is a suit to vacate a labor arbitration award. Marino was dissatisfied at losing his bid for screen credit, and in an attempt to overcome the traditional judicial deference to arbitration awards under LMRA § 301(a), 29 U.S.C. § 185(a),[1] he launched a full-scale attack on the entire procedure. The district court upheld these procedures as fundamentally fair and found no reason to vacate the award. The Ninth Circuit concluded that Marino had waived any objections to the procedure by failing to raise them until after he lost the arbitration. In the only other reported decision to review the screen credits determination procedure, a California Court of Appeal similarly held that it is entitled to deference, including the provision for anonymity of the arbiters. *See Ferguson v. Writers Guild of America, West, Inc.*, 226 Cal. App.3d 1382, 277 Cal. Rptr. 450 (1991).

What Marino is really asking is for a court to substitute its judgment for that of the writers in determining how screen credits are to be decided. The California Court of Appeal wisely declined the same invitation:

> "As judges we are no doubt as capable as any lay person of studying screenplays, outlines, and other literary material to assess the relative contributions of

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[1] *See United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 596-99, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). The Federal Arbitration Act, 9 U.S.C. § 10, cited by Marino as the statute involved, "does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases . . . ." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). Therefore, it is not the "statute involved," but may be referred to in fashioning the federal common law under LMRA § 301(a). *Id.*

> the participating writers. The membership of the Writers Guild, however, have agreed among themselves (by approving the [Screen] Credits Manual) and with the producers' association (by entering into [the MBA]) that this delicate task is to be performed by arbitration committees composed of experienced Writers Guild members. The professional writers who constitute the Writers Guild have thus decided—quite appropriately, we think—that the credit-determination process can be handled both more skillfully, more expeditiously, and more economically by Writers Guild arbitration committees than by courts." *Ferguson, supra*, 226 Cal. App.3d at 389, 277 Cal. Rptr. at 454.

II. THERE ARE NO CONFLICTING DECISIONS AMONG THE CIRCUITS

Marino cites no conflicting authority among the circuits on any legal issue involved in this case. In the only other published opinion to consider the screen credits determination of the Guild, *Ferguson v. Writers Guild of America, west, Inc.*, 226 Cal. App.3d 1382, 277 Cal. Rptr. 450 (1991), the Guild procedure was also upheld. 226 Cal. App.3d at 1389-91, 277 Cal. Rptr. at 454-55.

Marino claims that the Ninth Circuit's holding that Marino waived his claims to the anonymity of the writers, is inconsistent with decisions stating that a party does not waive an objection where the objection is futile. But the Ninth Circuit also said that "we do *not* hold that every possible endemic procedural defect must be raised in advance or waived." Petition for Writ of Certiorari at A-13 (emphasis added). Instead, it looked at Marino's objection as a challenge to the impartiality of the arbiters, which he had an opportunity to raise early in the proceedings. In fact, Marino struck 85 names from the list furnished to him by the Guild and returned the list without comment, implying that he had no objection to the remaining names. Petition for Writ of Certiorari at A-10.

Among the circuits there is no dispute that a claim of arbitral bias is waived if it is not raised before the arbitrator is seated. *See Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1317 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358-59 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987); *Early v. Eastern Transfer*, 699 F.2d 552, 558 (1st Cir.), *cert. denied*, 464 U.S. 824 (1983); *United Steelworkers Local 1913 v. Union Railroad Co.*, 648 F.2d 905, 913 (3d Cir. 1981); *In re Cook Industries, Inc. and C. Itoh & Co.*, 449 F.2d 106, 107-08 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

The unanimity of the circuits leaves no room to argue that clarification is required by this Court.

III. THIS CASE IS FACTUALLY UNIQUE AND A DECISION BY THIS COURT WOULD HAVE NO GENERAL APPLICABILITY

The screen credits determination procedure is a specialized procedure designed to deal with one particular kind of dispute in one particular collective bargaining agreement.[2] This is not a run-of-the-mill arbitration over discipline or seniority. It is designed only to deal with the difficult issue of authorship of a screenplay, an issue which does not arise in any other collective bargaining agreement of which we are aware. It is the unique nature of this type of dispute which calls for such unique procedures. Because of this singularity, the issues raised by these procedures are of little interest and less relevance to parties to any other collective bargaining agreement.

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[2] The MBA also contains a more traditional grievance/arbitration procedure for other contract disputes.

IV. THERE ARE NO IMPORTANT ISSUES OF LAW OR POLICY WHICH WOULD BE DECIDED IN THIS CASE

There is no issue which could be raised in this case which will have a significant impact on either the state of the law or any parties outside of those immediately concerned with the dispute. The issue of waiver decided by the Ninth Circuit is based on a finding of the particular facts of this case in which Marino did not object to the arbiters or the procedure for selecting them until after they had ruled against him.

Nothing the Court does here will, as Marino argues, Petition for Writ of Certiorari at 13, encourage potential litigants to employ a process which is already established as the norm in collective bargaining contracts. *See United Steelworkers v. Warrior Gulf & Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). Instead, the question is whether the courts will substitute their own judgment for that of the parties who agreed to this procedure, a proposition that this Court has laid to rest. *See, e.g., Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 111 S.Ct. 1127, 1135, 113 L.Ed.2d 51 (1991) ("Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union"); *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 39, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) ("The parties bargained for arbitration to settle disputes and were free to set the procedural rules for arbitrators to follow if they chose").

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 93-509

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICK MARINO,

Petitioner,

v.

WRITERS' GUILD OF AMERICA, WEST, INC., FRANCIS F. COPPOLA and MARIO PUZO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In their Opposition to Petition for Certiorari ("Opposition"), respondents Writers Guild of America, West, Inc., Francis F. Coppola and Mario Puzo do not question the profound need to assure fundamental fairness in current methods of alternative dispute resolution and do not disagree with Marino that the circuit courts have not provided sufficient guidelines as to what constitutes fundamental fairness. Rather, respondents have misconstrued the basis of Marino's Petition, as well as the nature of the arbitration system in issue, to make the argument that the Court should defer establishing such guidelines until another day.

Marino briefly addresses the arguments raised by respondents below.

ARGUMENT

I. MARINO SEEKS A FAIR ARBITRATION PROCEDURE, NOT THE DETERMINATION OF WRITING CREDITS BY THE COURT.

Respondents argue that Marino is asking for a court to substitute its judgment for that of the writers in determining screen credits. To the contrary, Marino asks only that the Court establish the guidelines of fundamental

fairness in arbitrations generally, i.e., the minimum indicia of fundamental fairness in any arbitration. Thus, Marino does not ask that a court award him credit. Marino seeks only to have the award of screen credit vacated, so that a panel of qualified, impartial arbitrators can make the determination after a hearing on the merits.

Respondents also argue that the Court should leave the determination of screen credits to the writers themselves. Marino agrees that writers should determine writing credits. However, that is not an issue in this case. This action does not challenge, or threaten, writers' exclusive province to determine writing credits. Marino simply contends that the arbitration procedures used by the WGA should meet the same minimum standards of integrity of arbitrations conducted by other entities. Marino's concerns are the same as those of any other party in any other arbitration -- to have the opportunity to be heard on the merits by an impartial trier of fact.

Respondents cite *Ferguson v. Writers Guild of America, West, Inc.*, 226 Cal.App.3d 1382, 277 Cal.Rptr. 450 (1991). In *Ferguson*, a writer who received a shared screen credit for the motion picture "Beverly Hills Cop II" sought to set aside the credit determination so that he could get sole credit. However, he raised none of the issues of fundamental fairness and fair representation which are involved in this action. *See* 226 Cal.App.3d at 1388. The issue raised in connection with identities of the arbitrators was that the plaintiff wanted to take their depositions "to explain and justify their conclusions." The

California Court of Appeal held simply that the plaintiff was not "permitted to conduct an inquisition into the arbitrators' thought processes in reaching their award." 226 Cal.App.3d at 1391.

Here, Marino does not seek to discover the arbitrators' thought processes. Instead, the issue of the identities of the arbitrators involves whether the arbitrators were biased or partial, or whether they existed at all. *Ferguson*, in fact, supports Marino's position. That court held that judicial review is proper to determine "whether the procedures employed deprived the objecting party of a fair opportunity to be heard." 226 Cal.App.3d at 1389.

Thus, contrary to respondents' contention, Marino concurs that writing credits should be determined by writers, but contends that the procedures should afford him a fair opportunity to be heard by impartial individuals.

II. THE ISSUES HERE APPLY GENERALLY TO ARBITRATIONS IN ALL CONTEXTS.

Respondents assert that nothing the Court does here will encourage potential litigants to arbitrate disputes since arbitrations are the norm in disputes over collective bargaining agreements. Respondents thereby seek to limit the application and the importance of the issues raised in the Petition. In so doing, respondents misconstrue the nature of the arbitration here and the applicable authorities.

Respondents claim that the arbitration of screen credits is an arbitration under 29 U.S.C. Section 185(a), and that the Federal Arbitration Act does not apply to "contracts of employment of . . . workers." (Opposition, p. 5, n. 1.) However, 29 U.S.C. Section 185(a) involves the "violation of contracts between an employer and a labor organization representing employees." The determination of screen credits does not involve any "violation of a contract between an employer and a labor organization," and does not involve any "contract of employment of a worker." None of the arbitration procedures here are contained in the collective bargaining agreement; to the contrary, the Minimum Basic Agreement merely provides that the motion picture producers "will accept and follow the designation of screen credits" by the WGA Arbitration Committee.

Similarly, respondents claim the union negotiated the screen credits determination system with the employer. That is simply untrue. There is *no* evidence that any provision of the Screen Credits Manual was established in collective bargaining. Thus, the arbitration procedure in issue is not merely a "labor arbitration" pursuant to 29 U.S.C. Section 185(a), and there is no issue concerning the WGA's conduct in negotiating that system. The issue remains the minimum level of integrity necessary for any arbitration to be considered fundamentally fair.

III. THE WGA'S ATTEMPTS TO CHARACTERIZE ITS ARBITRATION PROCEDURE AS FAIR ARE UNPERSUASIVE.

Respondents contend that the necessary procedural safeguards, such as a hearing on the merits, are provided here because the procedure is divided into three phases. Ostensibly, the lack of procedural safeguards contained in one aspect of the arbitration is somehow remedied by the purported safeguards in other phases. Thus, the WGA implicitly concedes that the second phase of the procedure, in which the arbitrators make the "substantive decision," does not contain the procedural safeguards necessary to assure a fair hearing on the merits, or any hearing at all.

The WGA argues that a writer receives a full hearing on the merits because the WGA sometimes conducts "a pre-arbitration hearing in which factual issues are resolved after a hearing which each party may attend." Opposition at p. 3. However, the "pre-arbitration hearing" concerns only evidentiary questions of a foundational nature, i.e., the authenticity of the screenplays in issue, and the sequence in which they were written.[1] The second phase of the procedure, in which the substantive decision is made, contains *no* procedural safeguards. The third, and final, phase of the procedure, a review by a Policy Review Board, does not substitute for

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[1] Moreover, the participants to a WGA arbitration do not have an absolute right to a pre-arbitration hearing. In this case, Marino requested such a hearing in connection with his 1987 treatment, but the WGA refused to hold one.

the inadequate substantive phase, especially because the aggrieved party has no opportunity to present meaningful evidence to the Board.

Respondents also make several misstatements about the facts of this particular arbitration. For example, respondents state that one arbitrator, not two, failed to read all of the material submitted. The record below squarely contradicts this assertion[2].

Respondents also misconstrue the fact that evidence was received ex parte, claiming that this refers to the arbitrators' consideration of the novel, "The Godfather," and the two earlier motion pictures in the "Godfather" series. Although the WGA failed to put any of this material into evidence (and, hence, the arbitrators also received that material ex parte), that is not the issue which Marino raises. The critical issue lies in the WGA's failure to disclose the arbitration statements of the parties to the other parties, so that the arbitrators improperly received that evidence ex parte.

Finally, respondents claim that the Guild's procedures are unique and, consequently, they are of little

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[2] The first arbitrator who voted against Marino flatly said he "did not read all thirty-three scripts." When the Policy Review Board discovered that this arbitrator had not read Marino's treatment, among thirty-one unread scripts, the WGA sent a copy of that treatment to the arbitrator and asked if his decision would change based on the reading of that treatment. However, the evidence is that this arbitrator never read the thirty other scripts. Furthermore, the second arbitrator who voted against Marino said he did not read the material with "great thoroughness" or with "great scrutiny."

interest to parties in other arbitrations. However, the motion picture industry is not the only industry with distinctive disputes. The motion picture industry, like all others, should be subject to the law governing arbitrations, including the requirement that they be fundamentally fair. Nothing justifies a judicially sanctioned exemption for screen credit arbitrations.

Marino has petitioned this Court to establish guidelines in this area. No unique aspect of determining writing credits is involved here. To the contrary, this petition involves critical issues of the right to be heard by impartial arbitrators, which have universal applicability.

IV. THE DECISIONS OF THE NINTH CIRCUIT AND THE DISTRICT COURT CONFLICT WITH DECISIONS OF THIS COURT.

Respondents contend that the decisions below do not conflict with decisions of this Court. However, to the extent that the District Court and Ninth Circuit held that the WGA need not disclose the identities of the arbitrators, or "any dealings that might create an impression of possible bias," they conflict with this Court's holding in *Commonwealth Coatings Corp. v. Continental Casualty Company*, 393 U.S. 145, 149, 21 L.Ed.2d 301, 89 S.Ct. 337 (1968).

Furthermore, the Ninth Circuit holding that Marino waived his objections is inconsistent with the holding of

Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324, 329-31, 21 L.Ed.2d 519, 89 S.Ct. 548 (1969), that a party does not waive an objection where such an objection would be futile. The fact that the Ninth Circuit recognized that not "every possible procedural defect must be raised in advance or waived," does not mean that affirmance of a summary judgment based on waiver, where there is substantial evidence of futility, does not conflict with *Glover*.

Respondents also argue that there is no dispute among the circuits that a claim of arbitral bias is waived if not raised before the arbitrator is seated. However, in each of the cases cited by respondents, the arbitrators' identities, and bias, were known prior to the hearing, and there was an opportunity to object thereto at the hearing. *See, e.g., Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1359 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) ("The successful party in the grievance may not rely on the failure to object for bias . . . unless [a]ll the facts now argued as to [the] alleged bias were known . . . at the time the joint committee heard their grievances.'")

Here, Marino to this day does not know the identities of the arbitrators,[3] and raised his objection to

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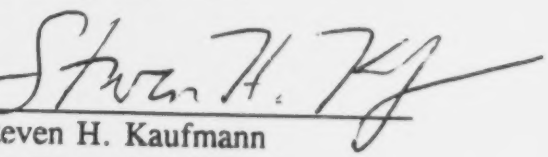
[3] Respondents note that Marino struck various names from a list of the 1600 potential arbitrators. However, not only did they WGA's Assistant Director testify that it was impossible for a party to determine the potential bias of these 1600 potential arbitrators, but the three actual arbitrators were selected by the Screen Credits Coordinator, who demonstrated bias against Marino.

the secrecy of their identities at the first, and only, opportunity, i.e., the hearing before the Policy Review Board.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

By: 

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